90 FLRR 1-1632

Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, OH and AFGE, Council 214

Federal Labor Relations Authority

5-CA-80255; 38 FLRA No. 75; 38 FLRA 887

December 10, 1990

Judge / Administrative Officer

Before: McKee, Chairman, Talkin and Armendariz, Members

Related Index Numbers

72.611 Employer Unfair Labor Practices, Unilateral Change in Term or Condition of Employment, Indicia of Change

72.613 Employer Unfair Labor Practices, Unilateral Change in Term or Condition of Employment, Adequacy of Notice of Change

72.614 Employer Unfair Labor Practices, Unilateral Change in Term or Condition of Employment, Union Request for Bargaining

Case Summary

THE EMPLOYER DID NOT ADEQUATELY NOTIFY THE UNION OF A PROPOSED CHANGE IN WORKING CONDITIONS. The Authority found that the implementation of an agency regulation that changed conditions of employment concerning sick and annual leave procedures violated 5 USC 7116(a)(1) and (5). The union was not given adequate notice of the proposed change when, 10 days prior to implementation, the labor relations officer gave a copy of the revised regulation to the union president, but stated that the agency saw no bargaining obligation. Under these circumstances, it would have been futile for the union to demand bargaining. The employer was ordered to rescind its regulation and to bargain with the union.

Full Text

DECISION AND ORDER

I. Statement of the Case

The Administrative Law Judge issued the attached decision in the above-entitled proceeding, finding that the Respondent violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) when it unilaterally implemented revisions to Air Force Regulation 40-630, "Absence and Leave," without providing the Union with notice and an opportunity to bargain over the change. The Respondent filed exceptions to the Judge's decision, and the General Counsel filed an opposition to the exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, we have reviewed the rulings of the Judge made at the hearing and find that no prejudicial error was committed. We affirm those rulings. Upon consideration of the Judge's decision and the entire record, we adopt the Judge's findings and conclusions, and recommended order as modified.*

Among other things, the Respondent asserts that it did not violate the Statute when the regulation was distributed throughout the Respondent's organization because it did not give instructions to implement the regulation until at least 10 days after presenting the revised regulation to the Union. The Respondent argues that:

"[t]en [d]ays is certainly ample time to constitute opportunity for the Union to request bargaining if it took exception to management's expressed opinion that working conditions would not be changed by implementing the [regulation]. Alternatively, it was more than enough time for the Union to request management [to] delay implementation."

Respondent's brief in support of exceptions at 15.

The record reveals that the Respondent's labor relations officer, Sheila Hostler, gave the revised regulation to Union President Paul Palacio the day after it had been distributed throughout the Respondent's organization. Palacio asked whether that

constituted notice, as required by the collective bargaining agreement when a regulation is issued that triggers a bargaining obligation. Hostler testified that she replied, "'No, it is not. There is no bargaining obligation here. There is no change to the regulation.'" Transcript at 76.

In view of this admission by the Respondent that it informed the Union that it would not bargain about the revised regulation, it is immaterial whether the Respondent had in fact instructed its subordinate offices to disregard any provisions that differed from the parties' agreement. Regardless of the Respondent's intent in this regard, the Union reasonably should have been able to rely on what it had been told by the Respondent's labor relations officer. Accordingly, under the circumstances, it would have been futile for the Union to demand bargaining. Moreover, as it was the Respondent's labor relations officer who informed the Union that there was no bargaining obligation, it is irrelevant that the regulation was issued by a higher level of the organization. As we agree with the Judge that the revised regulation contained unilateral changes in working conditions, we conclude, as did the Judge, that the Respondent implemented those changes without providing the Union with notice and an opportunity to bargain about the substance and/or the impact and implementation of those changes.

II. Order

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in the working conditions of bargaining unit employees, by unilaterally implementing revision of Air Force Regulation 40-630, "Absence and Leave" without first notifying the American Federation of Government Employees, Council 214, AFL-CIO, the exclusive representative of certain of its employees, and affording it an opportunity to bargain concerning the substance and/or impact and implementation of said changes.

(b) In any like or related manner interfering with, restraining or coercing any employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Rescind the February 1, 1988, issuance of the new Air Force Regulation 40-630.

(b) Notify and, upon request, negotiate with the American Federation of Government Employees; Council 214, AFL-CIO, the exclusive representative of a unit of its employees, of any intended changes concerning Air Force Regulation 40-630 and Air Force Regulation 40-631.

(c) Post at its facility copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Base Commander and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, 175 W. Jackson Blvd., Suite 1359-A, Chicago, IL 60604 in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

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* In his Recommended Order, the Judge directed that notices posted by the Respondent be signed by the base commander "or a designee." The Authority has held that notices shall be signed by an official designated by the Authority rather than one determined by the Respondent. U.S. Office of Personnel Management, Washington, D.C., 37 FLRA

784 (1990); Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 35 FLRA 1230, 1231-32 (1990). The Judge's Recommended Order has been modified to delete the reference to "or a designee."

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute unilateral changes in the working conditions of bargaining unit employees by unilaterally implementing revisions of Air Force Regulation 40-630, "Absence and Leave" without first notifying the American Federation of Government Employees, Council 214, AFL-CIO, the exclusive representative of certain of our employees and affording it an opportunity to bargain concerning the substance and/or the impact and implementation of said changes.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the February 1, 1988 revisions of Air Force Regulation 40-630 "Absence and Leave."

WE WILL notify and, upon request, negotiate with the American Federation of Government Employees, Council 214, AFL-CIO, the exclusive representative of a unit of our employees, in advance of implementing any proposed changes to Air Force Regulation 40-630 and Air Force Regulation 40-631.

_____

(Activity)

Dated:_____

By:_____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region V, whose address is: 175 W. Jackson Blvd., Suite 1359-A, Chicago, IL 60604, and whose telephone number is: (312) 353-6306.

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. 7101 et seq., 92 Stat. 1191 (hereinafter referred to as the Statute) and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV section 2410 et seq.

On March 31, 1988, the American Federation of Government Employees, Council 214, AFL-CIO (hereinafter referred to as the Union) filed an unfair labor practice charge against Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base (hereinafter referred to as Respondent). Based on the investigation of that charge the Regional Director of Region V issued a Complaint and Notice of Hearing on May 27, 1988 alleging that the Respondent violated sections 7116(a)(1) and (5) of the Statute when it unilaterally implemented revisions to Air Force Regulation 40-630, "Absence and Leave" without providing the Union with notice and an opportunity to bargain over the change.

Respondent's Answer denied the commission of any unfair labor practices.

A hearing was held before the undersigned in Dayton, Ohio. All parties were represented and afforded full opportunity to be heard, to examine and

cross-examine witnesses, to introduce evidence and to argue orally. Post hearing briefs were filed and have been duly considered.

Upon consideration of the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusion of law and recommendations.

Findings of Fact

At all times material herein, the Union has represented a unit of approximately 73,000 civilian employees of Respondent located at several different Air Force Logistics Command (herein called AFLC) facilities around the country as well as AFLC headquarters, which is located at Wright-Patterson Air Force Base, Ohio. These civilian employees comprise almost 90 percent of Respondent's work force. An estimated 20,000 supervisors are involved in supervising the above employees.

Respondent and the Union have been parties to a Master Labor Agreement (herein called MLA) at all times material herein. The present MLA became effective in October 1986. It was preceded by an earlier MLA, which became effective sometime in either April or May 1979. Articles 23 and 24 of the MLA concern annual and sick leave and both topics are covered in a rather comprehensive manner by the parties. These articles deal with leave from scheduling to leave approval to advance of sick leave for disability.

On February 1, 1988, a new Air Force Regulation, AFR 40-630 was distributed and placed in libraries and offices throughout AFLC. Its purpose was to supply supervisors with information on "when and under what conditions employees are granted annual leave, sick leave, leave without pay, and other specialized forms of leave and absence" and to help supervisors determine "if a specific type of absence is charged to leave, excused without charged leave, or considered official duty." The regulation, which was entitled "Absence and Leave," superseded and combined the provisions of two earlier regulations, AFR 40-630, "Leave Administration" and AFR 40-631, "Policies Relating to Specific Types of Absence."

The record contains a comparison of AFR 40-630 with the regulations it superseded. The comparison was not intended to be all inclusive but sought to show, for example, some provisions which had not been addressed in the MLA, but were new or changed from the predecessor regulations. Some of the provisions such as parental leave, found in Chapter 9; call-in procedures found in Chapter 3-4(a); medical documentation, found in Chapter 1-3(g) were urged by the General Counsel as creating an obligation to bargain because they were either totally new provisions or because they constituted a unilateral change in an already existing policy. As previously stated, since there were several pure examples of working conditions the entire comparison was not considered.

On or about February 2, 1988, Sheila Hostler, AFLC Labor Relations Officer gave a copy of the regulation to Paul Palacio. Palacio has served as President of the Union for about 7 years. According to Hostler, when she handed the regulations to Palacio, in response to his question, she advised him that her action did not constitute advance notification to the Union of a change to the regulations and furthermore, there was no bargaining obligation and no change in conditions of employment.

Conclusions

The General Counsel contends that Respondent admitted in its Answer that it had unilaterally implemented AFR 40-630, without providing advance notice to the Union and that as a result of the pleadings the only defense available to Respondent was that it had no obligation to bargain. I disagree that this was the only defense available to Respondent. Moreover, I reject the General Counsel's gratuitous statement in its brief that allowing a Respondent to explore possible defenses "confuses the litigation and erodes the quality of practice in these cases." Allowing a party an opportunity to present relevant defenses, whether or not the General Counsel thinks the matter should be explored is

generally in the interest of fair play. Furthermore, whether evidence or arguments should be allowed in the record is within the purview of the Administrative Law Judge who under the regulations of the Authority has a duty to "inquire fully into the facts as they relate to the matter." Respondent in this matter was doing nothing more than presenting its case, as it saw it.

With respect to the main issues in this matter it is clear that Respondent published and sent AFR 40-630 to various locations on February 1, 1988, a day before it presented the regulations to the Union. Respondent contends that it did not intend to implement and that it did not implement the regulation until it had been placed in the Union's hands and it had several weeks to request bargaining over the new regulation. Respondent also contends that its review of the regulation showed no change in conditions of employment.

Regarding Respondent's argument that no working conditions were changed it is well established that leave both sick and annual constitute conditions of employment and are negotiable subjects both as to substance and impact and implementation. See, National Federation of Federal Employees, Local 1798, 27 FLRA 239 (1987); U.S. Department of Interior, Bureau of Reclamation, 20 FLRA 587 (1987); Department of Health and Human Services, Office of the Secretary, Headquarters, 20 FLRA 175 (1985); Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 14 FLRA 475 (1984); American Federation of Government Employees, Local 3488, 12 FLRA 532 (1983). Respondent's answer is that it directed all Command Activities to ignore the new regulation where it conflicted with the MLA. These instructions are hardly enough to meet its obligation to negotiate with the Union prior to issuing the directive. In any event, instructions to subordinate offices, even if they were given, are not a substitute for negotiations. I am in complete agreement with the General Counsel that Respondent's alleged precautions and review were no substitute for the bilateral process of bargaining.

Respondent's contention that there is no reliable specific evidence that any conditions of employment were changed by the regulation is also rejected. A comparison of AFR 40-630 clearly establishes that it contains provisions which are not addressed in the MLA, some of which were new and some which placed new requirements on unit employees when using leave. These changes, particularly where the regulation covers negotiable subjects not addressed in the MLA are certainly matters which involve working conditions.

Concerning the issue of whether advance notice was given to the Union, it is abundantly clear that no such notice was given prior to the implementation of AFR 40-630 even under Respondent's representation of the facts. Thus, even in its brief to the undersigned, the Respondent states that the directive issued on "February 1, 1988" while the earliest possible notification to the Union was "February 2, 1988" when Hostler hand delivered the directive to Palacio. This action and Respondent's apparent awareness that there were some conflicts with the MLA and other directives for guidance on both sick and annual leave persuades me that Respondent should have been aware that the Union was entitled to advance notice and an opportunity to bargain in the instant matter. Thus, its issuing the direction with the admonition that it was "to be made effective only to the extent that it did not conflict with any terms of existing guidance" seems to be an admission that a bargaining obligation existed. Even if not, it shows that Respondent should have been aware of its bargaining obligation since certain conflicts clearly existed. Where such conflicts clearly existed Respondent should have been aware of its bargaining obligation and any unilateral implementation would be made at its peril.

Based on all of the foregoing it is found and concluded that Respondent violated sections 7116(a)(1) and (5) of the Statute when it unilaterally implemented revisions to Air Force Regulation 40-630, "Absence and Leave" without providing the Union with notice and an opportunity to bargain concerning the substance and/or impact and

implementation of the change. Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, it is hereby ordered that the Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio:

1. Cease and desist from:

(a) Unilaterally implementing changes in the working conditions of bargaining unit employees, by unilaterally implementing revision of Air Force Regulation 40-630, "Absence and Leave" without first notifying the American Federation of Government Employees, Council 214, AFL-CIO, the exclusive representative of certain of its employees, and affording it an opportunity to bargain substance and/or impact and implementation of said changes.

(b) In any like or related manner interfering with, restraining or coercing any employee in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Rescind the February 1, 1988, issuance of the new Air Force Regulation 40-630.

(b) Notify and upon request negotiate with the American Federation of Government Employees, Council 214, AFL-CIO, the exclusive representative of its employees of any intended changes concerning Air Force Regulation 40-630 and Air Force Regulation 40-631 and afford it the opportunity to bargain over said changes.

(c) Post at its facility copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the base commander or a designee and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., August 31, 1989.

ELI NASH, JR. Administrative Law Judge

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WE WILL rescind the February 1, 1988 revisions of Air Force Regulation 40-630 "Absence and Leave."

WE WILL notify and upon request negotiate with the American Federation of Government

Employees, Council 214, AFL-CIO, the exclusive representative of our employees in advance of implementing any proposed changes to Air Force Regulation 40-630 and Air Force Regulation 40-631.

_____

(Activity)

Dated:_____

By:_____

(Signature) (Title)

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